IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 535 ..... MISCELLANEOUS

ESTHER J. SAUERWINE, Administratrix, ESTATE OF LUZERNE C. SAUERWINE, deceased,

Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI, PROHIBITION, OR MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND BRIEF IN SUPPORT THEREOF.

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Attorney for Petitioner.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 388

ESTHER J. SAUERWINE, Administratrix, ESTATE OF LUZERNE C. SAUERWINE, deceased,

Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a corporation,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI.

Petitioner, Esther J. Sauerwine, Administratrix of the Estate of Luzerne C. Sauerwine, deceased, by Melvin L. Griffith, her attorney, respectfully moves the Court for leave to file the annexed petition for writ of certiorari, Prohibition or Mandamus under Section 1651, (a) New Title 28 United States Code, Judiciary and Judicial Procedure (formerly Section 262, Judicial Code, 28 U. S. C. A. Section 377), directed to the United States District Court for the Northern District of Illinois, Eastern Division, to review an order and judgment of that Court, entered December 29th, 1948, transferring the above case under Section 1404(a) of said New Title 28, which order and judgment is more particularly described in the Petition and for such other, different and further relief as may appear to the Court to be just and proper.

MELVIN L. GRIFFITH,
Attorney for Petitioner.

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ESTHER J. SAUERWINE, Administratrix, ESTATE OF LUZERNE C. SAUERWINE, deceased,

Petitioner,

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THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI, PROHIBITION OR MANDAMUS.

To the Honorable The Supreme Court of the United States:

The Petitioner, Esther J. Sauerwine, Administratrix of the Estate of Luzerne C. Sauerwine, deceased, respectfully petitions this Honorable Court as follows:

1. To review the order and judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered December 29th, 1948 transferring the above cause under Section 1404(a) New Title 28 Judicial Code, Judiciary and Judicial Procedure.

2. For an appropriate Writ; Certiorari, Prohibition or Mandamus, to said Court under Section 1651(a) of said New Title 28 for that purpose.

In this behalf, Petitioner shows:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is a suit brought August 13, 1948, by Petitioner, in the United States District Court for the Northern District of Illinois, Eastern Division, under the Federal Employers' Liability Act[1] against respondent to recover damages suffered by Petitioner on account of the death of her husband, Luzerne C. Sauerwine, alleged to have resulted from the negligence of Respondent. (R. 1-3)

Respondent answered (R. 5-6) and Petitioner replied (R. 6-7).

Respondent, on December 1, 1948, filed its Motion for an order transferring the cause to the United States District Court for the Northern District of Indiana, Fort Wayne Division, at Fort Wayne, Indiana, pursuant to Section 1404(a) of the Judicial Code. (R. 8)

From Respondent's Affidavit in support of its Motion (R. 8-11) and Petitioner's Counter Affidavit (R. 11-12) it appears there is no dispute as to the following pertinent facts:

Petitioner is a resident of Fort Wayne, Indiana, approximately 150 miles from Chicago. The accident which resulted in decedent's death occurred at Claypool, Indiana, approximately 112 miles from Chicago, while he was employed as a flagman on one of Respondent's trains running between Fort Wayne and Chicago.

Two of the witnesses, Robert E. Bullard and Steven F. Sallas, fellow crew members of decedent at the time of the accident, live in Chicago. Other witnesses live near Claypool or at Ft. Wayne, Indiana. (R. 9)

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1 35 Stat. 65, 45 U.S.C.A, Sec. 51-60.

Respondent's lines run into Chicago and it is doing business there. (R. 1.5)

Briefs were filed by the parties (R. 7-14) and on December 29, 1948, without any hearing or oral argument, the following order was entered (R. 12-13):

> "This cause having been heretofore taken under advisement on the motion of the defendant to transfer this cause, after due consideration of the briefs of counsel and the Court being now fully advised in the premises it is
>
> "Ordered that this cause be and it is hereby transferred to the United States District Court for the Northern District of Indiana, Fort Wayne Division, at Fort Wayne, Indiana and it is
>
> "Further Ordered that the Clerk of this Court forthwith forward a certified transcript of the record herein to the Clerk of the last named court at Fort Wayne, Indiana."

Orders staying the execution of the transfer order pending the disposition of the case by this Court were entered (R. 13 Appendix, Page 49).

JURISDICTION TO REVIEW.

The date of the order and judgment of the District Court, which this Court is asked to review, is December 29, 1948.

The jurisdiction of this Court is invoked under Section 1651(a) of New Title 28, United States Code, Judiciary and Judicial Procedure (formerly Section 262 of the Judicial Code, 28 USCA 377), as enacted by Public Law 773, 80th Congress, 2nd Sess., in effect September 1, 1948.

The order and judgment of the United States District Court (R. 12-13) is reviewable by this Court at the present stage of the proceedings under Section 1651(a). The basis of this Court's jurisdiction to review at this stage

of the proceedings, is to be found in the extraordinary situation created by the insertion in the revision statute of Subsection (a) of Section 1404, drafted in accordance with the doctrine of *forum non conveniens*, with no apparent intention on the part of Congress to give that doctrine any quality or effect which it did not previously possess. The resulting situation becomes extraordinary for the following reasons:

1. Chapter 87 of the New Judicial Code covers the entire field of Venue, except in cases arising under certain special statutes, such as the Federal Employers' Liability Act[2], the Sherman and Clayton Anti-trust Laws[3] and the Securities Act[4]. It broadens the Special Venue provision in cases arising under the Internal Revenue Act[5] and makes special provision for venue in many other cases[6].

Neither Section 56 of the Federal Employers' Liability Act[7] nor other similar Special Venue provisions of other statutes are amended or repealed.

2. Subsection 1404(a) was drafted in accordance with the doctrine of *forum non conveniens*[8].

3. Fundamentally, the general rules which have governed jurisdiction and venue under the Federal Employers Liability Act were fixed by this Court in the Second Employers Liability Act cases[9]. In subsequent cases, including *Baltimore & Ohio R. Co.* v. *Kepner*,[10] and *Miles* v. *Illinois Central R. Co.*[11] those rules have been refined and reaffirmed by this Court.

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2 35 Stat. 65, 45 USCA, Sec. 51-60.
3 15 USC Secs. 15, 22.
4 15 USC 77 V (a)
5 28 USC Sec. 105, New Title 28, Judicial Code, Sec. 1396.
6 New Title 28 Judicial Code, Secs. 1392-1403.
7 36 Stat. 291, 45 USCA Sec. 56.
8 Revisers Note, House Report No. 308 to accompany H. R. 3214, Page A132.
9 223 US 1 (1912).
10 314 US 44 (1941).
11 315 US 698 (1942).

This Court in the *Kepner* and *Miles* cases held that the doctrine of *forum non conveniens* is not applicable to cases arising under the Federal Employers Liability Act. In applying the doctrine in *Gulf Oil Co.* v. *Gilbert*,[12] a diversity case, this Court expressly excepted cases arising under that Act from the application of the doctrine. In refusing to apply the doctrine to cases arising under the Sherman and Clayton Anti-Trust Law in *United States* v. *National City Lines*[13] the Court held that the doctrine was subject to one invariable limiting principle, namely, that the doctrine did not apply in cases arising under these Acts, and cited the *Kepner* and *Miles* cases in support of that principle.

4. This long and consistent line of decisions fixing the rules governing these Employers Liability Act cases in which the Court has refused to apply the doctrine now codified in 1404(a), rest upon the enactment by Congress of Section 6 of the Act and the legislative history of that Section and of the Act itself.

Neither the Act, nor Section 6, nor the history of all or any part of the legislation, has been changed. The doctrine of *forum non conveniens* has been changed only in that it has been codified and its application in proper cases leads to transfer instead of dismissal.

The casual note of the Reviser, citing the *Kepner* case as an example of the need for the codification of the doctrine is the tenuous thread by which hangs the contention that this Court's interpretation of the Act over a period of nearly forty years, has been reversed by Congress.

5. There is no question but that Congress could have reversed the National public policy which it declared when it passed the Federal Employers Liability Act in 1908 and

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[12] 330 US 501 (1947).
[13] 334 US 573 (1948).

which it repeatedly reaffirmed in all subsequent amendments to the Act. It could have rendered the legislative history of the legislation insignificant; it could have declared that the original reasons for enacting the law no longer exist; it could have amended or repealed Section 6 and have thrown venue and jurisdiction back under the general or some special provision of Chapter 87 of the New Judicial Code; as the Constitutional legislative branch of the Federal Government it could have said or done something, expressly or by clear implication, that would have plainly revealed its intention to abandon its original and repeatedly reaffirmed policy.

Had it done any of these things, it could have reversed itself and in so doing could have reversed this Court. It did none of these things.

The question here, simply stated, is, can Congress reverse this Court without first reversing itself by doing or saying something to destroy the foundation upon which this Court based its decisions in the *Second Employers Liability, Kepner, Miles* and *National City Lines* cases?

Only this Court, the head of an independent, coordinate arm of the Government, can answer this question.

The reason for this is that the intentions and purposes of Congress in enacting and in amending the Act were given effect in these cases. Those intentions and purposes have not been, expressly or by clear implication, abrogated. On what basis, then, can it be held that Congress has reversed this Court, unless some Court is prepared to say that this Court has been wrong in its interpretation of the Act for forty years? Neither a District Court nor a United States Court of Appeals could make such a decision.

Petitioner is here, asking this Court to decide this question, because she and her counsel are convinced that this

Court has not been wrong and that it has not been overruled by Congress in the Court's long and consistent interpretation of the Act.

The Revision Committees are authorized to revise, codify and present to Congress for enactment into positive law each of the 50 Titles of the Federal Code. Two titles, the Criminal Code and the Judicial Code have been revised and so enacted. There are 48 titles yet to be revised and so enacted. The Court's disposition of this and other like cases presently before the Court will stand as a precedent for the Revisers to follow in their future work. If a provision like 1404(a) can be inserted in the important Judicial Code with the apparent or expressed approval of the Court, what other new and strange provisions will find their way into the remaining 48 titles of Federal Law, no one can predict. The effect would be to substitute a revision staff for the Constitutional Legislature and to turn the Congress elected by the people into a rubber stamp. Neither existing laws enacted by Congress nor the decision of this Court can be relied upon as enduring guides in the affairs of the American people, until the last Title has been revised, codified and enacted into law.

6. Section 1651(a) of the Revised Judicial Code gives this Court power to issue all writs necessary or appropriate in aid of its jurisdiction. This does not mean that the power to issue is absent where there is no existing or future appellate jurisdiction to which it can relate.[14] This Court exercised its jurisdiction in all of the above mentioned cases and entered its judgments. The power must of necessity extend to this situation in which all of the reasons for the exercise of the Court's jurisdiction and for rendering those judgments still exist, but in which, nevertheless, a great number of the lower Federal courts have held that

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14 *United States* v. *District Court*, 334 US 258, 263.

those judgments are of no further effect, for the sole reason that the doctrine of *forum non conveniens* has now been given statutory dignity.

There is no procedure provided for appellate review in these cases where the matter involved lies wholly outside the issues in the case, except as an incident to some final appeal from a final judgment on the merits of the case in the Court to which it is transferred. Such an appeal may then not be open to the party opposing the transfer. If it should be open to him, the damage to his rights has already been suffered and vindication thus emptied of all tangible or real satisfaction.

In any event the question of whether Congress has overruled this Court's decisions in these cases without any pretense that it has at the same time amended or repealed the special venue laws or that the reasons for and the purpose in passing them originally no longer exists, is one upon which only this Court can pass.

It is believed that the following authorities support this jurisdictional statement:

Ex Parte Republic of Peru, 318 US 578, 63 Sct 793;

United States Alkali Ex. Corp., 325 US 196, 65 Sct 1120;

DeBeers Consol. Mines Ltd. v. *U. S.*, 325 US 212, 65 Sct 1130;

United States v. *District Court*, 334 US 258, 68 Sct 1035.

QUESTIONS PRESENTED.

1. Does Sub-section (a) of Section 1404, Chapter 87, New Title 28, United States Code, Judiciary and Judicial Procedure, apply to cases arising under the Federal Employers Liability Act?

Stated another way:

Did Congress intend, by the enactment into law of Subsection (a) of Section 1404, Chapter 87, New Title 28, United States Code, Judiciary and Judicial Procedure, to overrule this Court's decision in the *Second Employers Liability Act, Kepner, Miles* and *National City Lines* cases on the question of the non-application of the doctrine of *forum non conveniens* in cases arising under the Federal Employers Liability Act and certain other special venue statutes?

2. Assuming that the Section could be held to apply, do the facts and circumstances of the case require the Court, in the exercise of its discretion, to transfer the case (a) for the convenience of parties and witnesses and (b) in the interest of justice?

STATUTES INVOLVED.

Section 6 (45 USCA Section 56) of the Federal Employers Liability Act:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. * * *"

Congress, on June 28, 1943, passed H.R. 3190, Ch. 173, 57 Stat. 220, which provided:

> "For preliminary work in connection with preparation of a new edition of the United States Code, including the correction of errors as authorized by the Act approved March 2nd, 1929 (45 Stat. 1541), $100,000 to be expended under the supervision of the Committee on Revision of the Laws."

The Act of March 2, 1929 (45 Stat. 1541), Section 2, provided:

> "There shall be prepared and published under the supervision of the Committee on the Revision of the Laws of the House of Representatives:
>
> "a) A consolidation and codification of the laws, general and permanent in their nature.
>
> • • • • • • •
>
> "d) New editions of the code of laws of the United States, correcting errors and incorporating the then Current Supplement."

The Act of June 25, 1948, Public Law 773, 80th Cong. 2d Sess., which is entitled "An Act To revise, codify, and enact into law title 28 of the United States Code entitled 'Judicial Code and Judiciary'," provides:

> "Section 1:
>
> "That title 28 of the United States Code, entitled 'Judicial Code and Judiciary' is hereby revised, codified, and enacted into law, and may be cited as 'Title 28, United States Code, section . . .,' as follows:
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> • • • • • • •
>
> "§ 1404. Change of venue.
>
> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
>
> • • • • • • •
>
> "§ 1651. Writs.
>
> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law."

REASONS FOR GRANTING THE WRIT.

Due to the extraordinary nature of the question presented here a review by this Court of the judgment of the District Court is the sole remedy open to Petitioner. This Court, alone, can answer the question which has already arisen in numerous cases in District Courts throughout the Nation and, until it is finally answered by this Court, will continue to arise in suits brought under the Federal Employers Liability Act and other similar statutes.

The extraordinary nature of the question arises from the insertion in the Revised Judicial Code of a principle developed by the Courts and cautiously applied by the Courts in cases in which it was deemed to be in the interest of justice. In the interest of justice, the Courts hedged the principle about with rules, such as this Court announced in the *Gilbert* case, designed to prevent its becoming a powerful weapon in the hands of powerful defendants in attempts to hamper weaker opponents in the vindication of their rights.

The lower Courts are following the principle as codified in the New Judicial Code, Subsection (a), Section 1404, Chapter 87 without reference to these rules.

As is demonstrated by the instant case, cases arising under the Federal Employers Liability Act are being transferred automatically, upon motions to transfer. In the instant case at least two important witnesses live in Chicago where suit was brought (R. 9). Other possible witnesses live between Chicago and Fort Wayne, Indiana, or in Fort Wayne. The accident happened at or near Claypool, Indiana, one hundred and twelve miles from Chicago (R. 10, 11).

The grounds for transfer in this and many other cases

appear to have been merely that of clearing the dockets of the Courts of "out-of-town suits."

It does not appear that the Court ever considered whether the case could be more conveniently tried in Chicago than in Fort Wayne or whether trial there would be in the interest of justice. In the argument we contend that from the standpoint of both convenience and justice, the case should be tried in Chicago.

The sole effect claimed for Section 1404(a) is that it reverses this Court's decisions in these cases in which the Court has made and has established its interpretation of these special venue statutes, as the law. These statutes have not been repealed or amended or the rights which they expressly create impaired, unless the insertion of Section 1404(a) in the Revised Judicial Code has overruled the Court and given to *forum non conveniens* a quality which this Court has consistently held it never had.

This Court, therefore, is the only tribunal that can answer the question of whether Congress in the manner shown by the revision record has changed its original purpose and has withdrawn its original mandate and in so doing has made of all of this Court's decisions on the subject a dead letter in the law. If this can be done by the insertion of 1404(a) in the revision of the important Judicial Code under the limited authority given to the Revision Committees and their revision staff, what the federal law and federal court decisions, including the decisions of this Court, may be said to be or hold, is little more than a mere guess, until the entire 50 titles of the United States Code are revised and enacted into law.

For these reasons this Court has the power and should grant the appropriate writ; certiorari, mandamus or prohibition, whichever suits best, the review of the judgment in this case.

PRAYER.

For the reasons above given, Petitioner prays for a Writ of Certiorari directed to the United States District Court, Northern District of Illinois, Eastern Division, or a Writ of Mandamus, or such other writ as to this Court may seem appropriate to the end that the questions arising by reason of the judgment of said Court may be reviewed and determined by this Court and that the judgment of said Court be reversed with directions to said Court to hear and determine the case on its merits and for such other and further or different relief as to the Court shall seem just and proper.

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ESTHER J. SAUERWINE, Administratrix, ESTATE OF LUZERNE C. SAUERWINE, deceased,

Petitioner,

vs.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OR OTHER APPROPRIATE WRIT.

I.

OPINION BELOW.

No opinion was written. The order and judgment of the District Court are set forth in the Petition and appear in the Record (R. 12-13).

II.

JURISDICTIONAL GROUNDS.

The jurisdiction of this Court is invoked under New Title 28, United States Code, Judiciary and Judicial Procedure, Section 1651 (a).

The situation which calls for the exercise of this power in this case is comparable, at least, to that involved in *Ex Parte Republic of Peru*, 318 U. S. 578; *United States Alkali Exp. Ass'n.* v. *United States*, 325 U. S. 196; *De Beers Consol. Mines* v. *United States*, 325 U. S. 212; and *United States* v. *District Court*, 334 U. S. 258, 263.

We believe the situation here to be without precedent. We have discussed that situation in the Jurisdictional Statement and in Reasons for Granting the writ, in the Petition and believe that what we have said there covers the subject. The importance of the question, the gravity of the situation and the far reaching consequences caused by the unbridled application by the lower courts, both Federal and State, of Section 1404 (a) to these cases will further appear from the argument.

III.

STATUTES INVOLVED.

See Petition at Pages 9-10 above.

IV.

QUESTIONS PRESENTED.

1. Does Sub-section (a) of Section 1404, Chapter 87, New Title 28, United States Code, Judiciary and Judicial Procedure, apply to cases arising under the Federal Employers' Liability Act?

Stated another way:

Did Congress intend, by the enactment into law of Subsection (a) of Section 1404, Chapter 87, New Title 28, United States Code, Judiciary and Judicial Procedure, to overrule this Court's decisions in the *Second Employers' Liability Act, Kepner, Miles* and *National City Lines* cases on the question of not-application of the doctrine of *forum non conveniens* in cases arising under the Federal Employers' Liability Act and certain other special venue statutes?

2. Assuming that the Section could be held to apply, do the facts and circumstances of the case require the Court, in the exercise of its discretion, to transfer the case (a) for the convenience of parties and witnesses, and (b) in the interest of justice?

V.

SUMMARY OF THE ARGUMENT.

I.

In the preparation of the revision and recodification of the Judicial Code and other provisions of law relating to the Judiciary of a general and permanent nature, the Revision Committees of the House and Senate and the staff of advisers and experts inserted in the draft of the Revised Judicial Code sub-section 1404(a) in which was codified and enacted into law as a provision of the Code, the doctrine of *forum non conveniens*.

That doctrine, at the time it became law as a provision of the Revised Code, was subject to the invariable limitation that it was not applicable to cases arising under certain special venue statutes, including the Federal Employers Liability Act as amended.

The Courts, including this Court, on the basis of relevant material and pertinent factors appearing in the history, background circumstances and the enactment of this Federal Act and its subsequent amendments into law, determined that Congress had not conferred upon the courts power to qualify a plaintiff's selection of a forum in which to bring his suit.

There is no relevant material or pertinent factors in the history of the enactment of Sub-section 1404(a) of the Revised Judicial Code or of the Revised Code itself that indicates any legislative intention on the part of Congress to amend, repeal or in any way impair the venue provision of the Federal Employers Liability Act or any other provision of that Act, or to change in any way the relevant material or pertinent factors upon which the courts determined that the doctrine of *forum non conveniens* is not applicable to cases arising under that Act.

For these reasons, Congress had no legislative intention, in the enactment of Sub-section 1404(a) into law as a part of the Judicial Code, to overrule or to reverse the trend of this Court's decisions in the *Second Employers Liability; Kepner, Miles* and *National City Lines* cases.

Sub-section 1404(a), therefore, is confined in its effect to cases arising under the venue provisions included in Chapter 87, Section 1391-1403 of the Revised Judicial Code and does not apply to cases arising under these special venue laws.

II.

Assuming that 1404(a) does apply to these cases, it does not apply to the facts and circumstances in the case at bar.

VI.

SPECIFICATION OF ERRORS TO BE URGED.

The United States District Court, for the Northern District of Illinois, Eastern Division, erred:

1. In holding that Section 1404(a), Title 28, United States Code, conferred upon the Court, the power to transfer this case to the United States District Court for the

Northern District of Indiana, Fort Wayne Division, at Fort Wayne, Indiana.

2. In holding that it was for the convenience of parties and witnesses, in the interest of justice, that this case be transferred to said Court at Fort Wayne, Indiana.

3. In transferring the case to said Court at Fort Wayne, Indiana.

VII.

THE ARGUMENT.

I.

Section 1404(a) does not apply to cases arising under the Federal Employers' Liability Act.

The question here presented is one of great importance, for the reason that it again puts in issue the right of an injured railroad man, in possession of an undisputed right to sue his employer at a place where his employer is carrying on his business, to have his case heard and decided in that place. That issue has long been settled and often confirmed in his favor, by an imposing line of decisions of this Court and by many Federal and State Courts whose opinions are worthy of great respect.

It is a difficult question for the reason that there can be found nothing beyond the language of the provision itself and the casual and indirect expression of the Reviser's note, in the record made by Congress or its Committees in revising and enacting the Judicial Code into positive law, dealing directly with 1404a, to aid the Court in determining what its answer should be. Fortunately, nevertheless, these two matters do not constitute the sole or the strongest evidence of the Congressional will.

The correct answer lies in:

A. The history of 1404 (a), including its source, and the authority for and the purpose, plan, and the method followed in the revision and recodification of Title 28 U. S. C.

B. The controversial nature of 1404 (a), if it is construed in such manner as to affect cases arising under these special Acts, and the far reaching consequences of such a construction.

C. The settled rules for determining the effect of fragmentary enactments written into general legislation dealing with a particular subject consisting of a system of related general provisions, indicative of a settled policy.

A.

The History of Section 1404 (a).

(a)

Authority for the Revision.

Near the end of the 76th Congress (1939), the need for a comprehensive revision of the Judicial Code, Title 28, U. S. C. A., was recognized. On October 5th, 1939, Hon. Walter Chandler of Kentucky, introduced House Joint Resolution 388, which was referred to the Committee on Rules. Cong. Rec., Vol. 85, 2nd Session, 76th Congress, Page 148. Since this joint resolution finally became, in part, the authority for making the revision, we shall quote its pertinent provisions (See Vol. 65 Reports of American Bar Association [1940] Page 429 for full text):

> "To establish a joint committee to prepare a revision and recodification of the Judicial Code and other provisions of law relating to the judiciary.
>
> • • •
>
> "Sec. 2. It shall be the duty of the Joint Committee to prepare a revision and recodification of the

Judicial Code and other provisions of law relating to the Judiciary (including in general all provisions similar to those included in title 28 of the United States Code), of a permanent and general nature. In performing this duty, the joint committee shall bring together all statutes and parts of statutes relating to the Judiciary, shall omit redundant and obsolete enactments, and shall make such alterations as may be necessary to reconcile contradictions, supply omissions, and amend imperfections of the original text; and may *propose* and embody, in such revision and recodification, changes in the substance of existing law; but all such changes shall be clearly set forth in an accompanying report, which shall briefly explain the reasons for the same." (Italics supplied.)

In stating the need for the revision, Mr. Chandler said on the floor of the House, October 30th, 1939:

"The judicial code was enacted on March 3rd, 1911, after two years' study. Almost thirty years have passed since that study was made. The code which was adopted has been amended about two hundred times, but has not been revised or reenacted as a whole. The remainder of Title 28 of the Code of the Laws of the United States was enacted at various times from 1874 to 1938. There have been numerous amendments of those provisions, but no revision or reenactment since June 22, 1874. The assembling of all the provisions of Title 28 of the United States Code has been of the highest practical value; but, since that is merely *prima facie* evidence of law, it is not an adequate substitute for a revision and reenactment."

This Joint Resolution was approved by the House of Delegates of the American Bar Association in a resolution adopted at the mid-winter meeting, 1940. 65 A. B. A. Rep. 426.

Congress, on June 28, 1943, passed H. R. 3190, Ch. 173, 57 Stat. 220, which provided:

"For preliminary work in connection with preparation of a new edition of the United States Code, in-

cluding the correction of errors as authorized by the Act approved March 2nd, 1929, (45 Stat. 1541), $100,000 to be expended under the supervision of the Committee on Revision of the Laws."

The Act of March 2nd, 1929 (45 Stat. 1541), Section 2, provided:

> There shall be prepared and published under the supervision of the Committee on the Revision of the Laws of the House of Representatives:
>
> a) A consolidation and codification of the laws, general and permanent in their nature.
>
> • • •
>
> d) New editions of the code of laws of the United States, correcting errors and incorporating the then Current Supplement.

These provisions and the above joint resolution is the authority for making the revision and recodification.

(b)

The Source of 1404 (a).

The Committee of the House of Delegates of the American Bar Association in 1941 obtained suggestions as to what changes in *existing* law should be made and included in the new code, from federal judges, authors of textbooks, and articles discussing it and from lawyers practicing in the federal courts. Among the subjects which, in the judgment of this Bar Committee, based upon suggestions made in response to its inquiry, should be included, were (66 A. B. A. Repr. 240, 243 (1941):

> (1) A plain statement that venue statutes apply only to original proceedings.
>
> (2) Codify in *general* the Neirbo Rule.
>
> (3) Make provision for transfer instead of dismissal of an action where venue has been laid improperly.

(4) Make provision for transfer where venue is proper but the action could be more conveniently tried elsewhere.

Subject number (4) is 1404 (a).

(c)

The Plan and Method of Revision.

The work of revision was delayed by reason of a controversy in Congress over which of two Committees would have jurisdiction of the matter and there was a threatened postponement due to the war. The American Bar Committee referred to this fact in discussing this threatened postponement, and suggested the plan and the method of revision (67 A. B. A. Reps. 202 [1942]):

> "If Congress as a body were to undertake the revision, there should be a postponement because Congress does not now have the time for such an effort. But revision will not, of necessity, be made in that manner. Congress will undoubtedly and properly keep immediate control through a Congressional Committee, and ultimate control in itself. But the responsibility for research, drafting, preparation, and correlation ought to be lodged in one person—a reporter for the Congressional Committee, similar in function to the reporter for the Supreme Court's Advisory Committee."

The revision finally got under way in 1944. Charles J. Zinn, Counsel to the Committee on Revision of the Laws, in a sort of progress report entitled, *Revision of the Federal Judicial Code*, in Vol. 48-49, Law Notes, Page 11, Numbers 3 and 4, October and December, 1944, said:

> "The Committee on Revision of the Laws, which is headed by the Honorable Eugene J. Keogh of New York, Chairman, is a standing committee of the House of Representatives, established in 1868. Its primary continuing function is the preparation of new edi-

tions and supplements of the United States Code and it has in the past considered substantial revisions, as well as codification of laws. The committee has engaged the services of the West Publishing Company of St. Paul, Minnesota, and the Edward Thompson Company, of Brooklyn, New York, Publishers of the United States Code Annotated, who have assisted the Committee in the preparation of each edition and supplement of the United States Code since the adoption of the first edition in 1926, to undertake the current revision of the criminal and the judicial code. The editorial and manuscript staffs of these companies are particularly well equipped to handle the work and have been working in close cooperation with the Committee and its counsel. They have supplemented their regular editorial staffs by the addition of Hon. William W. Barron, former chief of the Criminal Appeals Section of the Department of Justice who is acting as Reviser (similar to the role of reporter, suggested in the report of the American Bar Association.)"

In the process of getting the final revision and recodification enacted into positive law, several bills were introduced: H. R. 3498, June, 1945; H. R. 7124, July, 1946, accompanied by House Report 2646; H. R. 2055, February, 1947, on which hearings were held by Sub-Committee No. 1 of the Committee on the Judiciary March 7th, 1947; H. R. 3214, April, 1947, accompanied by House Report 308. H. R. 3214 was passed by the House July 7th, 1947 and went to the Senate. Hearings were held there by a Sub-Committee of the Senate Committee on the Judiciary and was reported favorably with certain amendments, accompanied by Senate Report 1559. This bill passed the Senate June 12th, 1948, was approved July 25th, 1948, and became effective September 1st, 1948.

Sub-section 1404 (a) was included in all of these bills.

(d)

Scope of the Revision.

The following expressions, made at hearings by those who were responsible for the final product, are pertinent to a decision on the question before the Court (Transcript of Hearing on H. R. 2055, March 7, 1947):

Hon. Eugene J. Keogh, Congressman from New York, Chairman of the Committee on the Revision of the Laws:

"The policy that we adopted, which in my mind has been very carefully followed by the revisers and by the staffs of the publishing companies as well as the employees of the committee, was to avoid wherever possible and whenever possible the adoption in our revision of what might be described *as controversial substantive changes of law.*"

• • •

But, further, we proceeded upon the hypotheses that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion in the work of any highly controversial changes in law.

Mr. Robsion. And this bill does not include controversial matters?

Mr. Keogh. We have sought to avoid as far as possible, Mr. Chairman, any substantive changes that did not meet with unanimity of opinion."

Hon. Albert B. Maris, United States Circuit Judge for the Third Circuit, Philadelphia, Pa.:

"In addition to this our committee addressed a letter to each of the Federal circuit and district judges in the United States soliciting suggestions with respect to the revision. The many suggestions received in response to this letter were collated by our committee and transmitted to the revision staff. The result is that the revision which is now incorporated in H. R. 2055 embodies a number of practical improve-

ments in the judicial machinery of a *wholly noncontroversial nature* which have resulted from suggestions originating with the judges whose day to day administration of the various provisions of the Judicial Code gives them a special knowledge of these matters."

William W. Barron, Chief Reviser, West Publishing Company:

"The Advisory Committee, the Committee of the Judicial Conference on the Revision of the United States Code, the revision staff and all persons concerned in this work, have exercised extreme care to avoid any changes of substantive law, concerning which there might be any controversy."

Hon. Charles J. Zinn, Law Revision Counsel, Committee on the Judiciary:

"People who are afraid that we are changing the law to a great extent need not worry particularly about it."

James William Moore, Professor of Law, Yale University:

"Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. And section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice; and the provision for change of venue on the grounds of convenience is also embodied in the Bankruptcy Act for corporate reorganization, section 118, Eleventh United States Code, section 518."

When the bill H. R. 3214, reached the Senate, it was there presented by Senator Donnell of Missouri. Senator Robert-

son of Virginia asked the Senator from Missouri (94 Cong. Rec. 8108-8111):

> "The bill presents this codification as a thoroughly expert codification of existing law, does it not?"
>
> Mr. Donnell:
>
> "Mr. President, I think the Senator from Virginia is quite correct. There was assembled a staff of experts who, in my opinion, are real experts."

Senator Donnell stated the purpose of the bill to be, primarily:

> To revise and codify and to enact the resulting Judicial Code into positive law, with such corrections as were deemed by the Committee to be of substantial and non-controversial nature.

There were eighty or more amendments of the House Bill noted in the Senate Committee's Report. On the floor, these amendments were considered enblock and adopted. There was not the usual procedure that is followed when a new law is under consideration. In both Senate and House, the bill was placed on the consent calendars; rules were suspended and it became law, practically without opposition. Its provisions, aside from the one involving the Tax Court, were not debated or discussed, either in the Committee hearings or on the floors of Congress.

After the Amendments were disposed of, the Record recites (P. 8111):

> The bill was read the third time and passed.
>
> Mr. Donnell:
>
> "Mr. President, I take it that the action which has been taken means that the bill has been passed, including the amendments reported by the Committee?"
>
> The President Protempore:
>
> "That is correct."

The Senate and House thus accepted the bill on the recommendation of the experts and we believe it reasonable

to say that nine members of the House and Senate out of ten never gave any consideration whatsoever to Section 1404(a), if, indeed, they even knew that it was included in the bill they voted into law.

The Experts and the Congressional Committees which completed the monumental task assigned to them, anticipated that very probability, for Congressman Robsion of Kentucky, Chairman of Sub-Committee Number 1, in a statement opening the hearings, March 7th, 1947, on H. R. 1600, the Criminal Code Revision and on H. R. 2055, predecessor of H. R. 3214 that became the new Judicial Code, said (Page 2):

> "Now, you know, 1600 looks like a very formidable document itself. It contains 472 pages. But our committee of experts, and distinguished judges, have read every line of that bill.
>
> So the important thing that this committee is trying to accomplish is to develop such a table so that the Members of the Congress will feel that what we present to them is as nearly correct as a work of this kind can be made correct, because you can never reach a time when the Members of Congress will read a bill like that and then turn to all the hundreds and hundreds of references, the various statutes, to see whether they are correct, or have been repealed, and perhaps we will not get many of them to read H. R. 2055, which contains over 170 pages."

When the Reports of Committees of both Houses and the Reviser's notes are added to the 170 page bill, that made a lot of reading matter for the busy legislator. Moreover, it was merely a revision and re-codification of existing law. That is a job for experts, not for statesmen. Men in whom he had faith made the New Code and presented the completed job to him with the assurance that it was as nearly correct as it could be made. Such changes as had been made, he was told, were wholly non-controversial.

Congressman Devitt of Minnesota, lawyer and former judge, said in his statement before Sub-Committee No. 1 recommending the passage of the bill (Transcript 3/7/47 Page 3):

> May I say a word about the West Publishing Co., of St. Paul, Minn., which organization, in connection with the Edward Thompson Co., of Brooklyn, N. Y., has been responsible for the revision and codification of the law embodied in these two bills. This work has been under the direction and personal supervision of Harvey T. Reid, vice president and editor in chief of the West Publishing Co. I know Mr. Reid very well and very favorably. I have the highest regard for his professional integrity and ability, and for his outstanding reputation in the field of law-publishing work. Mr. Reid has been associated with Federal statute work for many years. He worked on the preparation of the original United States Code which Congress enacted in 1926, and has served the House Committee on the Revision of Laws in the preparation of the supplements and new editions of the United States Code continuously since that time.
>
> I am also well and favorably acquainted with most of the editors and many of the technical assistants employed by the West Publishing Co., and have many times had an opportunity to judge at first hand the character and caliber of work performed by them.
>
> I emphasize the professional standing and ability of the authors of this work because I know that it is not humanly possible for the members to read every word or even every section of the bill and that of necessity great reliance must be placed upon the integrity and caliber of the persons who did the work.

Professor Herbert Weschsler of Columbia Law School says of the Revision[1]:

> "• • • Such an enterprise presupposes formal and interstitial improvement as the maximum objectives. Moreover, a bill of this scope, whatever its source, can hardly be accepted by the Congress on any other ground

[1]Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemporary Problems (Winter, 1948) Page 216.

> than its faith in the competence of the revisers and in the alertness of the bar to call attention to questionable details. To weight the draft with proposals posing controversial issues might well assure that no bill would be passed at all. These were, at least, the premises of the revisers. Within their limits they have not by any means produced a timid work."

In these circumstances, the legislator was under no heavy duty to read the law. It is safe to say that few did read it. The Act, nevertheless, bears the Congressional stamp and represents the legislative will on the subject of the Judiciary and Judicial procedure.

To that extent and within that scope, 1404(a) is the law. When we deal with it there we deal with reality.

When Congress enacted the venue and jurisdictional provisions of the Federal Employers' Liability Act in 1910, it deliberately severed all relationship between those provisions of that Act and the general venue and jurisdictional provisions of the Judicial Code. It is, therefore, another thing to say that the busy legislator, in the foregoing circumstances, intended to restore that relationship, that he intended to give to 1404(a) an "extra-territorial" effect that would destroy rights found by this Court to exist in the venue and jurisdictional provision of the Act.

To say that he so intended is to substitute pure fiction for reality.

The provision relied upon to destroy these rights is an insertion in a general revision and recodification of existing general law, relating to the Judiciary and Judicial Procedure. It cannot be assumed, *lightly*, that Congress intended to destroy this important right that the Courts have upheld for nearly forty years.

In *United States* v. *Sischo*, 262 U. S. 165, 43 SCt. 511-516, it was said:

> "The language under consideration was an insertion in the Revised Statutes. That volume was pri-

marily a codification of the general statutes then in force and is not lightly to be read as making a change, although of course it may do so."

There is no question but that Congress which granted this privilege could take it away. The courts, however, will not find that Congress has done that, unless the intention to do so is clearly shown.

(e)

Application of 1404(a) as a part of the Code.

Insofar as the Reports and Reviser's Notes indicate what was actually done in connection with any particular provision in the Code, the courts will find what is said about that persuasive, but not controlling on the question of intent. Insofar as they indicate the personal opinion of the Reviser or anyone else connected with the Revision, as to the effect of any particular provision, the courts will not even treat it as persuasive.

The fact that the Reviser, in his note on 1404(a), for instance, selected the *Kepner* case as an example of the need for 1404(a) is of little weight for two reasons:

(1) The Reviser's authority did not extend to the point where his attempt at interpreting the provision could bind the court.

(2) There is ample need for the provision to be found within the provisions of the completed code itself.

For instance, Section 1391(c) provides:

A corporation may be sued in any judicial district in which it is incorporated, or licensed, to do business or is doing business and such judicial district shall be regarded as the residence of such corporation for venue purposes.

This provision is a general codification of the Neirbo Rule [2] in response to the suggestion of the American Bar Association made in 1941, that such revision should include, among other subjects (66 A. B. A. Reps. 243):

> (1) A general codification of the Neirbo Rule. (See 308 U.S. 165.)
>
> (2) Provision for transfer where venue is proper but the action could be more conveniently tried elsewhere.

Suggestion (1) called for Suggestion (2) just as Section 1391(c) called for Section 1404(a), and this is all the explanation needed for the inclusion of 1404(a) in that chapter of the New Code. [3]

The foregoing history of the Revision and of the origin and nature of 1404(a), fits that sub-section into the Act of which it is a part, as defined by its title, and lends to it no quality that is not possessed by every other provision in the new code. That history must be considered in every case in which an attempt is made, to give to 1404(a) a quality superior to every other provision, in that its effect alone reaches beyond its related provisions and destroys rights created by special laws.

B.

The doctrine of forum non conveniens is not applicable in this case.

(a)

When the effect of Section 1404(a) is confined to the Act of which it is a part it is wholly noncontroversial in nature.

Section 1404(a), considered merely as a new general provision of the Judicial Code, is necessitated by the gen-

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[2] *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U. S. 165 (1939).

[3] See Note; The Doctrine of *Forum non conveniens*, 34 Va. L. R. (Oct. 1948) page 811 at pages 821-822.

eral and special venue provisions of Chapter 87 and in particular by the broadening of the Venue provision affecting corporations, in Section 1391(c). In that setting, Section 1404(a) is "wholly non-controversial" in nature. When the language and the effect of the provision is treated as all-inclusive, then it becomes "highly controversial". Such a construction places the provision squarely in conflict with the stated purpose of the Congressional Committees and their expert Revisers, as shown by excerpts from their statements, both in Committee hearings and on the floors of the Senate and House.

United States Circuit Judge Albert B. Maris, in his statement quoted above, said:

> "The revision which is now incorporated in HR 2055 embodies a number of practical improvements in the judicial machinery of a wholly non-controversial nature • • • ."

At that moment the Jennings Bill, HR 1639 was before Congress. That was a direct attempt to repeal or drastically restrict the venue provision of the Federal Employers' Liability Act.[4] This proposed legislation set off a controversy that has been characterized as follows[5]:

> "In this battle of the Titans, the organized Railroad transportation industry and the organized legal profession joined in supporting the proposal and were opposed by organized railway labor."

Even that proposed legislation, though its enactment created a bitter fight, would in the amended form recommended by a sub-committee of the Committee on the Judiciary in the Senate, be preferable in many respects to the powerful weapon handed to the Railroads in 1404 (a), if it is held to apply in these cases.

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[4]93 Cong. Rec. 9178-9173.

[5]Robert M. Mangan, Federal Legislation, 37, The Georgetown Law Journal (November, 1948) Page 43.

The controversy arising out of attempts to apply the reciprocal doctrines of *forum non conveniens* and injunction to cases under the Federal Employers' Liability Act, was a heated one that has been settled only by the decisions of the Supreme Court in the *Kepner, Miles, Gilbert* and *National City Lines* cases.

These decisions have become familiar to courts and lawyers throughout the nation. They as well as the battle on the Jennings Bill, were familiar to the experts, to members of the committees authorized to make a Revision, and to many members of Congress. The insistence of those responsible for making the Revision that there was nothing of a controversial nature in the completed Code demonstrates beyond question that there was no *legislative* intention anywhere, in Congress or out of it, to make Section 1404 (a) applicable to cases arising under the Federal Employers' Liability Act.

(b)

The Doctrine of forum non conveniens is given no added force by its codification in 1404(a).

The foregoing history and background furnish the relevant material in this case, upon the consideration of which this Court may properly determine whether by the enactment of Sub-section 1404(a), as a new provision of the Judicial Code, Congress intended to vest the courts with a new power to qualify Plaintiff's selection of any particular forum (as he still has a right to do under 45 U. S. C. A., Section 56) by transferring the case to another forum not selected by him.

Section 1404(a), in any event, is no more than a codification of the doctrine of *forum non conveniens*. That Doc-

trine has received recent approval of this Court, but with cases arising under special venue statutes excepted.

In a still more recent case brought by the United States under the Special Venue provision of the Clayton Act, (15 U. S. C. A. Sec. 22), this Court specifically restated its position on the question of the applicability of the doctrine in cases arising under special venue statutes. *United States* v. *National City Lines,* 334 U. S. 573, 68 Sct. 1169, 92 L. Ed. 1115.

On this subject the court said (92 L. Ed. at 1128):

> "Finally, both appellees and the District Court have placed much emphasis upon this Court's recent decisions applying the doctrine of *forum non conveniens* and in some instances extending the scope of its application. Whatever may be the scope of its previous application or of its appropriate extension, the doctrine is not a principle of universal applicability, as those decisions uniformly recognize. At least one invariable, limiting principle may be stated. It is that whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. *Baltimore & O. R. Co.* v. *Kepner,* 314 U. S. 44, 86 L. Ed. 28, 62 S. Ct. 6, 136 A. L. R. 1222; *Miles* v. *Illinois C. R. Co.,* 315 U. S. 698, 86 L. Ed. 1129, 62 S. Ct. 827, 146 A. L. R. 1104. The question whether such a right has been given is usually the crux of the problem. It is one not to be answered by such indecisive inquiries as to whether the venue or jurisdictional statute is labeled a 'special' or a 'general' one. Nor is it to be determined merely by the court's view that applicability of the doctrine would serve the ends of justice in the particular case. It is rather to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection.

> This is a case in which the pertinent factors make clear that the courts were given no such power."

We believe the "pertinent factors", revealed in the above recital of the history of the Revision, makes it just as clear that the doctrine as codified in Section 1404(a), does not give the courts any new power to transfer a case brought under the Federal Employers' Liability Act. The mere codification of the Doctrine into the Judicial Code gives it no greater force to destroy rights under special Acts than it had before it was written into the Judicial Code.

The court refused to apply the doctrine in the National City Lines case solely because of the special venue provision of the Anti-Trust law of which Mr. Justice Frankfurter, who dissented in that case, as he did in both the *Kepner* and *Miles* cases, said (92 L. Ed. at Page 1130):

> "I find nothing in the Anti-Trust acts comparable to the considerations which led this Court to conclude that the provisions of the Federal Employers' Liability Act were designed to give railroad employes a privileged position in bringing suits under that Act." (See, especially, concurring opinion in *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 705, 86 L. Ed. 1129, 1134, 62 S. Ct. 827, 146 A. L. R. 1104.

This case was argued April 28th, 1948, and decided June 7th, 1948: two days before H. R. 3214 was reported out of the Senate Committee on the Judiciary; five days before the bill was passed by the Senate; nine days before the House concurred in the Senate Amendments; and eighteen days before it became law.

While the bill was pending, this Court decided the *Gulf Oil* and *Koster* cases, (330 U. S. 501 and 518 [1946]) and the above cited *National City Lines* case (334 U. S. 573 [1948]).

In the House Report (No. 308) on H. R. 3214, it is said (Page 4):

"SUPREME COURT COMMITTEE"

> "The work of revision was greatly facilitated and advanced through the cooperation of a committee of Supreme Court justices appointed by the Chief Justice. This committee consisted of the late Chief Justice Stone and Associate Justices Frankfurter and Douglas. It was most cooperative in the solution of problems of concern to that Court.
>
> The afternoon sessions of the advisory committee meetings at Washington on December 5, 1945, and again on April 3, 1946, were honored by visits of this committee."

It would seem to be utterly absurd to contend that, in these circumstances, if there was any thought in the mind of anyone having anything to do with the Revision, that 1404(a) would apply to cases arising under these special venue statutes, creating a problem of such recent and great "concern to that Court", language would have been chosen that would have made such intention clear and unambiguous.

The courts, before the doctrine of *forum non conveniens* was written into the code, could use this "weapon in the arsenal of justice" in proper cases. It is still available for use in such cases under rules announced by this Court.

In the case of *Shoen* v. *Mountain Producers Corporation*, 170 F. (2d) 707, (1949) the District Court, prior to the effective date of Section 1404(a) applied the doctrine and dismissed as to certain defendants. There was an appeal and the United States Court of Appeals, in reversing and remanding, suggested that the defendants amend their motions to seek a transfer instead of dismissal in accordance with 1404(a) which in the meantime had become effective. The Court said (Pages 714-715):

> "Upon the remand of this case, therefore, it may well be appropriate for the district court, in view of

the intervening change in the procedural law, to permit these corporate defendants to amend their motions so as to seek a transfer of the action under Section 1404(a) instead of its dismissal and thereupon to give appropriate consideration to the motion as thus amended."

In Footnote 20 it is said:

"The consideration of these amended motions by the District Court would, of course, be had in the light of the rules for the application of the doctrine of *forum non conveniens* laid down by the Supreme Court in *Gulf Oil Corp.* v. *Gilbert*, 1947, 330 U. S. 501, 67 Sct. 839, 91 L. Ed. 1055, and *Koster* v. *Lumbermans Mutual Casualty Co.*, 1947, 330 U. S. 518, 67 Sct. 828, 91 L. Ed. 1067."

The opinion from which we quote above was written by Judge Albert B. Maris, Judge of the United States Circuit Court of Appeals for the Third Circuit, who was Chairman of the Judicial Conference Committee on the Revision of the Judicial Code (House Report 308, Page 3). His statement before Committee No. 1 is quoted above.

In the absence of express words or clear inferences to be drawn from "pertinent factors", *forum non conveniens*, notwithstanding its codification, is just what it always has been. There are no such express words and nothing from which such clear inference may be drawn.

In these circumstances, the reaffirmation by this Court of its position that the doctrine is not applicable in cases arising under these special venue provisions, is as decisive of the question in the case at bar as though the very question had been before the Court.

II.

Section 1404(a) is an enactment of a fragmentary nature related to the general subject of the Judiciary and Judicial procedure and its effect must be confined to the general law of which it is a part.

A.

The Applicable Rule.

The courts have a perfect precedent for the conclusion that the effect of 1404(a) is limited to cases arising under the general code.

In *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 396, it was said:

> "As a general rule, where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on the subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, excepting as a different purpose is plainly shown."

Panama R. Co. v. *Johnson*, 264 U. S. 375, 384, 44 S. Ct. 391, 393, is particularly applicable here. That case was brought under the Jones Act, which incorporates the Federal Employers' Liability Act.

The Jones Act provided:

> "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

This language, (as is that of 1404(a)), standing alone, was broad enough to give some color to the defendant's contentions.

The action was not brought in such district. Defendant appeared generally and demurred. The demurrer was over-

ruled on the ground that the provision related to venue only, which had been waived, and that the court had jurisdiction under the provisions of the Judicial Code.

Defendant contended in the Supreme Court that the language of the provision excluded jurisdiction of the trial court to entertain the suit.

In stating the above principle, the Court said:

> "Although not happily worded, the provision, taken alone, gives color to the contention. But as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed. See *United States* v. *Barnes*, 222 U. S. 513, 520, 32 Sup. Ct. 117, 56 L. Ed. 291; *United States* v. *Sweet*, 245 U. S. 563, 572, 38 Sup. Ct. 193, 62 L. Ed. 473. The rule is specially pertinent here. Beginning with Judiciary Act of 1789 (1 Stat. 73), Congress has pursued the policy of investing the federal courts—at first the Circuit Courts, and later the District Courts—with a general jurisdiction expressed in terms applicable alike to all of them and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant or in which he has a place of business—the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will. This policy was carried into the Judicial Code, and is shown in sections 24 and 51 (Comp. St. 991, 1033); one embodying general jurisdictional provisions applicable to rights under subsequent laws as well as laws then existing, and the other containing particular venue provisions. A reading of the provisions now before us with those sections, and in the light of the policy carried into them, makes it reasonably certain that the provision is not intended to affect the general jurisdic-

> tion of the District Courts as defined in section 24, but only to prescribe the venue for actions brought under the new act of which it is a part."

This rule, in the case at bar, is a two-edged sword *that cuts both ways.* When the present venue provision was in the Senate in 1910, it was there stated (45 Cong. Rec. Part 4, p. 4041):

> "The passage of the original Act and the perfection thereof by the amendments herein proposed stand forth as a declaration of public policy to radically change as far as Congressional power can extend those rules of the common law which the President (Taft) in a speech at Chicago, characterized as unjust."

This legislation has been systematically revised and restated and strengthened through the years and the courts have consistently found in it the intention to bestow special advantages in matters of venue upon injured railroad employees and have given to the entire Act an interpretation designed to carry out its humanitarian objectives. An intention to depart from that policy thus declared and so deliberately settled through nearly forty years, will not be assumed upon any basis so casual and frail as the Reviser's inaccurate example of the *Kepner* case as pointing to the need for 1404(a).

The rule thus serves to confine the effect of "the fragmentary amendment", Section 1404(a), to the "existing system" of the Judicial Code, and at the same time shields from its effect the settled policy declared by Congress in the Federal Employer's Liability Act, and construed into Section 56 of that Act by the courts with the same force as though *forum non conveniens* were excluded from the Federal Employer's Liability Act cases by the express language of the venue provision of that Act.

B.

The foregoing Rule applies notwithstanding the Language of 1404(a).

The provision with which we are here concerned is:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer *any civil action* to any other district or division where it might have been brought."

As was said above, this is a mere codification of *forum non conveniens*. That doctrine is still what it always has been and is still subject to that "invariable, limiting principle" to which the courts have found it subject.

The significant words of the provision "any civil action", do not relieve it of that restriction.

In ordinary circumstances, these words would not send us in a quest for the intended meaning and scope of the provision. They are simple words, and in ordinary circumstances we would give to them their ordinary meaning. They would, in the ordinary setting, be all inclusive.

In giving meaning to words or phrases, however, we cannot ignore the circumstances under which the words or phrases are used. In the case of *Towne* v. *Kisner*, 245 U.S. 418, 425, Mr. Justice Holmes said:

> "A word is not a crystal transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

We are here concerned about the color and content of these words, "any civil action." Neither the Revisers nor Congress has given us in express and positive words any key to their color or content. That color and content must be gathered from the circumstances under which they were used. It is for this Court to say, in the light of all those circumstances, what they mean.

C.

The foregoing Rule applies notwithstanding the Reviser's Notes.

The Reviser says of 1404(a):

> "As an example of the need of such a provision see *Baltimore & Ohio R. Co.* v. *Kepner,* 1941 * * * which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resides in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

The Reviser, for all that is shown in the revision record, assumes that the drafting of this new provision in accordance with the doctrine of *forum non conveniens* and its insertion in the Venue Chapter of the Code, the doctrine suddenly became invested with a character that the Courts, where the doctrine was "evolved and developed," say it never had. There is nothing in the entire revision record upon which to base this assumption. No one, in or out of Congress, who was connected with the revision and recodification work, ever said anything for the record that indicates any *legislative* intention on the part of Congress to overrule the Courts in the *Kepner* and *Miles* and *National City Lines* cases.

If, by his casual remark, the Reviser intended to place upon the provision the interpretation that its effect was to overrule the Courts in the cases referred to, then he exceeded his authority and his attempted interpretation is without any weight and in no sense, is it binding upon the Courts.

In *Texas and P. Ry. Co.* v. *United States,* 289 U. S. 627, 53 SCt, 768, where it was contended that the Interstate

Commerce Commission had placed a particular interpretation upon statutes there involved, it was held (53 SCt. at 733):

> "Where a statutory body has assumed a power plainly not granted, no amount of such interpretation is binding upon the Courts."

The Court refused for this reason to be bound by the Commission's interpretation.

In *United States* v. *Stewart*, 311 U.S. 60, 61, SCt. 103, where the Farm Loan Board had issued circulars interpreting the Farm Loan Act to exempt the income from Land Bank Bonds from income tax, the Court said (61 SCt. 102, 108):

> "There was no authority for the Board to make representations that capital gains were or were not tax exempt. That administrative function resided only in the Treasury."

In footnote 22 to this part of the opinion it is said (61 SCt. 102, 108):

> "Nor can the casual statement by the Secretary of the Treasury in the course of a Congressional hearing on the Revenue Act of 1918 to the effect that 'Land bank bonds carry a wider exemption than Liberty bonds * * * carry authoritative weight, as it does not even purport to be a discriminating analysis of this problem in its various aspects."

These very words can be adopted to fit the casual note of the Reviser in this case.

The mere statement of the Reviser in his note to 1404(a) that Kepner is an example of the need for such a provision is not, in itself, sufficient to give to the doctrine as codified any quality it did not previously possess. Congressional intention to change a rule long established cannot be found to exist on the basis of evidence so casual and vague.

As was said by the United States Court of Appeals, Seventh Circuit, in *Baltimore & O. R. Co.* v. *Chicago River & Indiana R. Co.*, 170 F. (2nd) 654, 658:

> "The primary rule of statutory construction is to give effect to the intention of the legislature. Whenever that is apparent it dominates and interprets the language used. So where there are two statutes, the earlier special and the later general, the special controls the general, and the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general. The general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. *Rodgers* v. *United States*, 185 U.S. 83, 22 S. Ct. 582, 46 L. Ed. 816. * * *"

While no one claims that the Venue provision of the Act (45 U.S.C.A. Section 56) has been repealed, yet the above language, by analogy, applies and refutes any contention that the codification of the doctrine of *Forum Non Conveniens* in the General Code gives to that doctrine such force as would destroy rights which the Courts for forty years have found to exist by reason of this Special Venue provision.

III.

Assuming that 1440(a) could apply to cases under the Federal Employers' Liability Act, the facts and circumstances in this case do not warrant its application.

From the affidavits filed in the case (R 8-12) it appears that two of the decedent's crew members live in Chicago. Decedent lived with Petitioner in Fort Wayne, Indiana, 150 miles from Chicago. The accident occurred at Claypool,

Indiana, 112 miles from Chicago and some possible witnesses live in Claypool and some at Fort Wayne.

The travelling time between Fort Wayne and Chicago is about two and one-half hours (R-11).

Petitioner's attorneys as well as Respondent's attorneys are in Chicago (R-12).

The saving to Petitioner, if the case is tried in Chicago, is more than 10% of any amount recovered (R-12).

It was for these reasons and not for the purpose of vexing or harassing Respondent, that the suit was brought in Chicago.

The transfer of the case in these circumstances was not in the interest of justice but constitutes a type of injustice that Congress had in mind when the Act was passed. Transfer will result in greater inconvenience to all parties than would trial in Chicago.

From all that appears in the record, the cause was transferred merely because it was an "out of town case".

The judicial notion of trial convenience is in balancing the conveniences of the parties. Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Gulf Oil Corporation* v. *Gilbert*, 330 U. S. 501, 67 S. Ct. 839.

In *Baltimore and Ohio R. Co.* v. *Kepner*, 315 U. S. 6, the distance of the place where suit was brought from the scene of the accident was in excess of seven hundred miles. In *Leet* v. *Union Pac. R. Co.*, 155 Pac. (2nd), 42 and *Union Pac. R. Co.* v. *Utterback*, 146 Pac. (2nd) 76, the Supreme Courts of California and of Oregon held the doctrine did not apply in cases under the Act where the suits were brought in a place eleven hundred miles from the scene of the accident.

In a recent article on the subject of *forum non conveniens* by Edward J. Barrett, Jr., a lecturer on jurisprudence in the University of California, the author concludes his study of the question with the following statement (35 Calif. Law Review 380, 422):

> "The modern rules of venue and jurisdiction have been designed to give a plaintiff every reasonable opportunity to recover for his wrongs. He should be denied the right to sue on a transitory cause of action in a court with jurisdiction over the parties only on a clear showing that he is abusing those rules for the purpose of vexing and harassing the defendant. Caution must be exercised in every case if the plea of *forum non conveniens* is not to become a powerful weapon in the hands of the defendant who is seeking to avoid his obligations."

This case is an example of what will occur and what is now occurring wherever these suits are brought, in the absence of any restrictive statute or Court decision governing such suits, if 1404(a) is to apply. Everything that Congress ever did to mitigate the dangers of the extra-hazardous work of railroad men is in the discard.

In the words of Mr. Justice Douglas[4], a decision by this Court not to correct this grave situation, is to let

> "* * * the administration of this law be governed, not by the aims of the legislation to safeguard employes but by a hostile philosophy * * *."

The injured railroad man will, in that case, again be placed largely at the mercy of his powerful employer.

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[4] *Wilkerson* v. *McCarthy*, 69 S. Ct. 413, 421.

CONCLUSION.

Petitioner therefore urges that the appropriate writ prayed for in the petition be issued; that the order and judgment of the United States District Court for the Northern District of Illinois, Eastern Division be reviewed by this Court and its judgment reversed and remanded with such directions as to the Court may seem just and proper.

Respectfully submitted,

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APPENDIX

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Esther J. Sauerwine, Administratrix of the Estate of Luzerne C. Sauerwine, *Plaintiff*,
vs.
The New York, Chicago and St. Louis Railroad, a corporation, *Defendant*.

No. 48 C 1159

ORDER STAYING EXECUTION OF ORDER ENTERED DECEMBER 29, 1940.

On Stipulation of the parties hereto, the execution of the order of December 29, 1948 transferring the above cause to the United States District Court for the Northern District of Indiana, at Ft. Wayne, Indiana is hereby stayed pending the disposition of Petition for Certiorari by the Supreme Court of the United States.

Enter Igoe,
Judge.

Dated at Chicago
January 31, 1949.